remove a bar or limitation which has already become completed, and can pass no law to take effect on existing claims without allowing parties a reasonable time in which to bring their action before such claims shall be barred by the new enactment; but within these limits there is no restriction on the power of the legislature. Laws quieting a long and undisputed possession of real estate are generally favored. Such laws give stability to titles, encourage improvements, and prevent the assertion of stale titles and claims. When it is clear that the party in possession has brought himself within the provisions of the statute, courts should have no hesitation in declaring him the lawful occupant. In *Spring* v. *Gray*, 5 Mason 523, Judge STORY says: "I consider the Statute of Limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction in favor of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory, or death or removal of witnesses." S. M.

FREMONT, Neb.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

HOAG *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

In questions of negligence, it is generally the province of the jury to determine the proximity of the cause to the injury complained of; where, however, the presence of an intervening agency is obvious, arising upon undisputed facts, the court should take the case from the jury.

Defendants' railroad ran along the bank of Oil creek; by reason of a landslide, unseen by the engineer, an oil train was thrown from the track, the tank cars burst, and the oil taking fire floated down the stream, causing the destruction of plaintiff's buildings, several hundred feet distant from the place of the railroad accident:

Held, that the burning of plaintiff's buildings was not such a natural and probable consequence of the negligence of defendants' engineer (if negligence there were), as ought to have been foreseen by him as likely to flow from his act, and, therefore, plaintiffs could not recover.

Held further, that, the facts being undisputed, the evidence was properly not submitted to the jury.

Penna. Railroad Co. v. *Hope*, 80 Penn. St. 373, distinguished. *Penna. Railroad* v. *Kerr*, 62 Penn. St. 353, followed.

ERROR to the Common Pleas of Venango county.

This was an action on the case to recover compensation for certain property destroyed by fire, caused, as was alleged, by the negligence of the defendants. The facts were as follows: The plaintiffs were the occupiers of a piece of land situate within the limits of Oil City, on the western bank of Oil creek. The railroad of defendants is constructed along said creek, over the land of the plaintiffs, and at the base of a high hill. On the afternoon of April 5th 1873, during a rain storm, there was a small slide of earth and rock from the hill-side down to and upon the railroad. About ten minutes prior to the accident one of the defendants' engines had passed over the road in safety; at that time no slide had occurred. This engine was followed in a few minutes by another engine, drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs, and partly consumed it. The court below, on these facts, directed a verdict for defendants.

C. W. Mackay, for plaintiffs.

McCalmont & Osborn, for defendants.

The opinion of the court was delivered by

PAXSON, J.—The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it, is not raised upon this record, and need not be discussed. The only question for our consideration is whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The court was asked to say: "That, if the jury believe from the evidence that the accident complained of was the result of negligence on the part of the defendants, and that, by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil creek, where it was carried by the current, in the space of a few minutes, to the property of the

plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The court answered this point in the negative, and then instructed the jury that as a matter of law upon the facts in the case the plaintiffs were not entitled to recover; which instruction is assigned here for error.

It was strongly urged that the court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Co.* v. *Hope*, 80 Penn. St. 373, and *Raydure* v. *Knight*, 2 W. N. C. 713, were cited as supporting this view. In the case first cited it was said by the Chief Justice, in delivering the opinion of the court: "We agree with the court below that the question of proximity was one of fact particularly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they became independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure* v. *Knight* was meagerly presented; the charge of the court was not sent up, and a majority of the court were of opinion that no sufficient cause for reversing the judgment had been shown. I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in *The Railroad Co.* v. *Hope*, and to be gathered incidentally perhaps from *Raydure* v. *Knight*, is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen and necessary result of such cause. But it has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus, in *The Railroad Co.* v. *Kerr*, 62 Penn. St. 353, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury,

but reserved the question of proximate cause upon the undisputed facts of the case. Of course, this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se: Railroad Co.* v. *Stinger*, 78 Penn. St. 219; *McCully* v. *Clarke*, 4 Wright 399; *Pennsylvania Railroad Co.* v. *Bennett*, 59 Penn. St. 259; while in *Raydure* v. *Knight*, *supra*, the court below, in answer to the defendants' second point, instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiffs' property. This ruling was affirmed by this court. I do not understand the decision in *The Railroad Co.* v. *Hope* to be in conflict with this view. It remains to apply this principle to the case before us. There is not a particle of conflict in the evidence so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiffs' third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the court had the right to give a binding instruction? We think not.

But one question remains; was the negligence of the defendants' servants, in not seeing the land-slide and stopping the train before reaching it, the proximate cause of the destruction of the plaintiffs' property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum* so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle substantially recognised in *The Railroad Co.* v. *Kerr*, and *The Railroad Co.* v. *Hope*, *supra*, that in determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely

to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur;* it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiffs' property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide. The obstruction itself was unexpected. An engine had passed along within ten minutes with a clear track. But the obstruction was there, and the tender struck it. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream, and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiffs' building? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil creek. The water was an intervening agent, that carried the fire just as the air carried the sparks in the case of *The Railroad Co.* v. *Kerr.* It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiffs' building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.

The doctrine of proximate or remote cause, in reference to liability for damages, has of late received considerable discussion in cases arising out of fires caused by the operation of railroads. The leading cases upon one view of the subject, are, *Ryan* v. *N. Y. Central Railroad,* 35 N. Y. 210, and *Penna. Railroad* v. *Kerr,* 62 Penn. St. 353.

Ryan v. *New York Central Railroad,* 35 N. Y. 210, was a case where the defendant negligently set fire to an adjoining house, and the fire spreading, ignited and consumed a neighboring building; it was held by the court that the cause of the fire was too remote to attach the liability to the defendant. *Penna. Railroad Co.* v. *Kerr,* 62 Penn. St. 353, was a case where an engine on the railroad company's track emitting sparks, by negligence set fire to a dwelling close by; the fire from this house was communicated to another house, at some little distance from it; the latter was consumed with all its contents, and it was held that the corporation was not liable in damages for the house and contents thereof last burned. See also *Macon Railroad Co.* v. *McConnell,* 27 Ga. 481, which was a case involving substantially the same questions of negligence, and in which the same rulings were made as in *Penna. Railroad Co.* v. *Kerr.*

Penna. Railroad Co. v. *Kerr,* however, appeared to be somewhat narrowed in its scope by a recent case before the same court; *Penna. Railroad Co.* v.

Hope, 80 Pa. St. 373, in which AGNEW, C. J., stated the rule as to the determination of proximate or remote cause to be "that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. * * * We agree with the court below that the question of proximity was one of fact, particularly for the jury. How near or how remote each fact is to its next succeeding fact in the concatenation of circumstances, from the prime cause to the end of the succession of facts which is mediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence." But the principal case shows that the court has not receded in any degree from the doctrine of *Railroad Co.* v. *Kerr*. The effect of the cases in Pennsylvania is that the question of proximate or remote cause is a question of fact to be determined like other facts by the jury from the evidence; but that in this class of cases as in all others, when the facts are agreed upon, or uncontroverted and incontrovertible, the law is to be pronounced upon them by the court. In *Railroad Co.* v. *Hope*, the facts were left to the jury to find; in *Railroad Co.* v. *Kerr*, and in the principal case, the facts being agreed or undisputed, the court pronounced the result as matter of law. With this distinction kept in view there is no conflict between the cases.

The authority of the decisions in *Penna. Railroad Co.* v. *Kerr*, 62 Pa. St. 353, and *Ryan* v. *N. Y. Central Railroad*, 35 N. Y. 210, was denied in the recent case of *Small* v. *Chicago, R. I. & P. Railroad Co.*, Supreme Court of Iowa, April Term, 1878. That was a case where the engine on the defendant's track, emitting sparks, set fire to an elevator adjoining the track, which spread from thence to plaintiff's elevator and destroyed it. It was held that the fire from the locomotive was the proximate cause of the loss, and that the railroad company was liable for the damages thereby occasioned.

In a late case in Kansas, it was held that where two fires were caused by the engines of the defendant corporation, said fires being caused by sparks from the engines, and where neither of the fires originated in plaintiff's land, but were kindled on the lands of different owners, and afterwards spread, and then uniting, and passed over the property of some other landowners, and finally came to plaintiff's property, which was four miles distant from where said fire originated, and burned some out-houses and other property, the court held that the damage was not too remote, and that plaintiff was entitled to recover: *Atcheson, T. & S. T. Railroad Co.* v. *Stanford*, 12 Kans. 354. In *Peoppers* v. *Missouri, Kansas & Texas Railroad Co.*, 7 Cent. Law Journal 252, a case where sparks from defendant's locomotive set fire to prairie along defendant's line, and a high wind blowing, the fire extended three miles during the evening, burning slowly during the night—again, in the morning, the wind rising, drove the fire about four miles further, where it reached plaintiff's farm, and destroyed his property; in an action for damages for the destruction of plaintiff's property, in which the question of negligence was raised, held that the facts *prima facie* showed negligence on part of the defendant, and that the damage by the fire must be considered as the direct and natural result therefrom, * * * and that the high wind at that season of the year, although aiding in the spread of the fire, was neither extraordinary or remarkable, and could not be regarded as the introduction of a *new agency*, so as to relieve the railroad company from the result of the negligence of its servants in permitting the fire to escape from its engine.

In England, in the case of *Jones* v.

Festiniog Railway Co., L. R. 3 Q. B. 733; it is held that a railroad company, having no express authority to use steam or any other power necessitating the use of fire, is liable for any damages occasioned by the escape of fire from its engines without regard to the question of negligence. And this is made expressly so by statute in some of the states. In Maine, see *Stearns* v. *Atlantic, &c., Railroad Co.*, 46 Me. 95; in New Hampshire, see *Hooksett* v. *Concord Railroad Co.*, 38 N. H. 242; in Massachusetts, see *Ingersoll* v. *Stockbridge, &c., Railroad Co.*, 8 Allen (Mass.) 438. Yet in the absence of any such statutory liability, a railroad company, authorized by its charter to use steam power, has necessarily granted, by implication, the right to use the usual and only methods of generating steam; that is, by fire, whether of wood, coal, or other combustible, and is not liable in damages for injuries unavoidably caused by the use of fire used in the generation of steam: *Burlington, &c., Railroad Co.* v. *Westover*, 4 Neb. 268; *Vaughan* v. *Taff Vale Railroad Co.*, 5 Hurl. & Norm. 679; *Freemantle* v. *London & Liverpool Railroad*, 10 C. B. (N. S.) 89. Yet these cases proceed upon the principle that the escape of the fire must be an unforeseen and unavoidable casualty. But in such cases the question of unavoidability is one of fact, to be determined by the jury from all the circumstances; and where a party seeks to recover damages caused by the escape of fire from a railroad company's engines, the burden of proof is upon the party charging negligence to show negligence in the company; for negligence will not be presumed against the company from the mere fact of the injury. Thus in the case of *McCready* v. *South Carolina Railroad Co.*, 2 Strob. (S. C.) 356, it was held that where the injury complained of was caused by the employees of the company emptying coals from the engine upon defendant's track, on trial this act was shown to be necessary, and that it was carefully done; court held that plaintiff, under circumstances, as proven, was not entitled to recover. But in the case of *Webb* v. *Railroad Co.*, 3 Lansing 453, where the coals were negligently dropped from defendant's locomotive, set fire to the ties under its track, and from the track it spread to plaintiff's woodland, and burned the wood to large extent and damaged the soil, plaintiff was held entitled to recover. In a late case in the Supreme Court of the United States, that of *Grand Trunk Railroad Co.* v. *Richardson*, 1 Otto 454, it was held that whether the destruction of property caused by fire escaped from a locomotive was the result of negligence on part of a railroad company, depends upon the facts shown as to whether or not it used the caution and diligence that the circumstances of the case demanded, or prudent persons ordinarily exercise, and not upon the usual conduct of other companies in the vicinity. See also *Troxler* v. *Richmond, &c., Railroad Co.*, 74 N. C. 379.

The statutes of several states which have heretofore been adverted to are identical, substantially; they usually, in substance, provide that the railway shall be liable for all damages by fire that is set or caused by operating such railway, and such damage may be recovered by the party damaged in the same manner as the remedy providing for the recovery of the value of stock.

Now the question arises, in case of these remote fires, is the corporation absolutely liable for damages caused by the escape of fire from its locomotives, whether it is guilty of negligence or not? It has been contended by able jurists, that, in such cases, there can be no recovery, unless upon proof of negligence on part of the defendant. They base their position on this argument, viz., this clause fixing the liability of the corporation, is usually in the same chapter with, and frequently forms one

section, together with those clauses fixing the liability for the destruction of stock, and they contend that a railroad company is liable for the destruction of stock on account of its negligence in not fencing its track; that the very fact of the absence of a fence, by itself, constitutes negligence, and, consequently, in case of fire, there can be no recovery against the company unless some negligent act can be proven or inferred. They conclude, from this, that as the cases contemplated in the section, or that part of the section relating to the destruction of stock, depend for a recovery on the proof of negligence, those for damages in case of fire must be dependent on proof of the same fact, and that damages in the latter case are recoverable by the language of the section in the same manner as the first.

Now, then, admitting it to be true that in an action for the recovery of the value of stock killed, the proof of negligence must be made to entitle plaintiff to recover; the assumption is, that, the negligence for the injuries to the stock, consists in the failure to fence. In the absence of a fence, the stock are permitted to go upon the track; the negligence consists in the omission to fence. Now why is not the same negligence found in the act of permitting the escape of fire? Injury results in its escape. Why could not the corporation prevent it? But it might be urged that the fire might escape through accident. But this should not excuse the corporation any more than running through the corporate limits of a town, through oversight or mistake, at a forbidden rate of speed, would excuse the killing of stock, while running at such rate of speed. The acts of permission in these two cases are of the same character; that is, in permitting stock to run on the track, by which permission the stock is injured; the permission of fire to escape by which property is destroyed. It may be contended that the company cannot dispense with the use of fire, it being necessary in the running of engines, and when in use, especially in the engines, liable to accidentally escape, and cannot be controlled with absolute certainty. But the law holds the escape of the fire to be *per se* negligence. It cannot admit of any such conclusion as an unavoidable and unforeseen escape of the fire. Contrivances may be applied to locomotives which would as effectually prevent the escape of sparks and coals as a good fence would prevent cattle from going upon a railroad track.

The argument may be more successfully refuted by denying the premises on which it is laid. The statute imposing liabilities on railroad corporations for stock killed by negligence of the company, does not require fences to be built. The right of action for damages for stock injured, depends on the negligence of the company in not building a fence. These statutes simply create a liability for damages caused by the killing of cattle where no fences are built; for there is no violation of the statute in an omission to fence; there are no rights involved therein, and the companies, if they refuse to fence their track, do no more than exercise a right, which the statute under consideration in no wise abridges or abrogates. When the law does not forbid an act, and when it is done in the exercise of a right, how can it be said to be negligence, especially when the doing of the act does not conflict with the rights of any one else?

As to the liability created by such a statute; at points along its line where it has the right to fence, and no fence is erected, a railroad corporation would be liable for stock killed. The statute applies to no other cases. Now, in regard to the remedy, negligence need not be shown; the proof of the injury or destruction of the property, by the owner, will entitle him to a recovery. Now it

naturally follows as a consequence of all this, that the right to fence, and the fact whether or not there is a fence at all, has no reference, whatever, to care or negligence. But in any one of the sections or clauses of the section of the statutes now under consideration, there is no condition accompanying the act of setting on fire necessary in order to create liability. It is absolute and unconditional, and dependent on no facts or circumstances; it is simply dependent on the fire alone. The provision does not relate to the liability, but only to the remedy. Whatever pertains to the remedy in the other sections, or to the remedial part of the same section, is referred to in this, and nothing else. From this it will readily be seen that no idea of negligence enters into the provision creating liability on account of fire.

C. M. DUNBAR.

Court of Appeals of Kentucky.

SAWYER ET AL. v. TAGGART.

An executory contract for the sale of chattels, to be delivered in the future is valid although the seller does not have them, nor any means of getting them at the date of the contract.

But an understanding between both the vendor and the purchaser, when the contract is made, that the property shall not be delivered, but that the one will pay, and the other receive the difference between the contract and the market price at the maturity of the contract, renders the transaction a mere wager and illegal.

If however either party contracts in good faith, a subsequent agreement that the property may be re-sold before the time of delivery arrives, or that the contract shall be settled by an adjustment and payment of differences, will not affect the validity of the original contract.

A party ordering a re-sale of property before the contract time for delivery arrives will be liable for all losses thereby sustained.

The delivery of a warehouse receipt for a given number of barrels of pork, which is only a parcel of a larger lot stored together, where there is nothing to indicate the specific barrels embraced in the receipt, will not create a lien in favor of the holder of the receipt.

THIS was an action by Taggart, the appellee, to settle and enforce a trust as assignee for the benefit of creditors of Hamilton & Co.

The facts as they appeared in the answer and proofs were as follows: Hamilton & Co., who were commission merchants in Louisville, had from time to time, commencing in December 1875, directed Sawyer & Co. (appellants), who were commission merchants and members of the Cotton and Produce Exchanges of New York, to buy for them in New York, for future delivery, certain specified quantities of cotton, pork and lard. Purchases were made as directed, and Hamilton & Co. were notified of the act. The rules of the exchanges where the cotton, pork and lard were pur-